FILED
JAN 23 1984

No. 83-568

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE OFFICES KNOWN AS 50 STATE DISTRIBUTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrant for petitioner's business premises was unconstitutionally overbroad in that it authorized the seizure of all business-related documents.

2. Whether petitioner is entitled to return of all the property seized because of the allegedly unconstitutional manner in which postal inspectors executed the warrant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. Supp. App. 1-22) is reported at 708 F.2d 1371. The opinion and order of the district court (Pet. App. A2-A12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1983. A petition for rehearing was denied on July 6, 1983 (Pet. Supp. App. 23-24). The petition for a writ of certiorari was filed on October 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 19, 1981, agents of the United States Postal Service, armed with a search warrant, conducted a search of petitioner's business premises and seized numerous business records and other items. Thereafter, petitioner moved

the United States District Court for the District of Nevada for return of the seized property, pursuant to Fed. R. Crim. P. 41(e). The district court granted the motion (Pet. App. A6-A12). The court of appeals reversed (Pet. Supp. App. 1-22).

1. On October 19, 1981, following several weeks of investigation, the United States Postal Service obtained a warrant authorizing the search of petitioner's place of business in Las Vegas, as well as "all persons" on the premises. The warrant authorized seizure of the following property (Pet. Supp. App. 2-3):

> lead source material, invoices, sales orders, order forms, books, records (magnetic or typewritten), ledgers, correspondence, pitches (written or taped), typewriters, premiums, gifts, supplies, and/or merchandise, United States Postal Service Money Orders, United States Postal Service C.O.D. firm mailing records and other evidence and instrumentalities for numerous ongoing violations of Title 18, United States Code, Sections 1341 (Mail Fraud), 1342 (Fictitious Names) and 371 (Conspiracy).

Postal authorities executed the search warrant on October 20, 1981, and seized extensive business records and other items.

The warrant was based on and incorporated the affidavit of Postal Inspector Wayne E. Gray. The affidavit described petitioner as a national supplier of advertising specialty products such as pens, key chains, and calendars, all bearing the name and advertising message of the purchaser. It described petitioner's business as a "boiler room" sales operation that engaged in fraud and misrepresentation in selling its promotional merchandise to small businesses on a nationwide basis. Gray's affidavit rested in large part on information supplied by a private investigator who gained

employment with petitioner, by brand name manufacturers that petitioner falsely claimed to represent, and by several victims of petitioner's fraudulent conduct. Pet. Supp. App. 3-4.

According to the affidavit (see Pet. Supp. App. 4-5; Ex. R. 9-16),[1] the private investigator had observed or overheard seven or more of petitioner's salesmen at work and found that it was the general practice of the salesmen, with the knowledge of their supervisors, to telephone prospective customers and inform them that they had been selected to receive a gift (such as a diamond, money clip, steak knife set, perfume, or Betamax recorder). The salesmen would then inform the prospect that in order to receive the free gift or to be eligible for another drawing he would have to purchase some of the advertising specialty products. The salesmen would claim to have for sale brand name, high quality merchandise, which they would send to buyers through the mail C.O.D. The merchandise was in fact of shoddy quality, and the gifts did not materialize or were substantially worthless. In addition, the affidavit described in detail 10 separate fraudulent transactions engaged in by petitioner (Ex. R. 18-26).

2. On December 22, 1981, petitioner moved the district court for return of the seized property, pursuant to Fed. R. Crim. P. 41(e). In support of the motion, petitioner argued that the search warrant was insufficiently particularized with respect to the items to be seized and persons to be searched, that it was unsupported by probable cause, and that it was executed in an unconstitutional manner. A hearing on the motion ensued.

The evidence adduced at the hearing is summarized in the opinion of the court of appeals (Pet. Supp. App. 8-10). It showed that at about 9:00 a.m. on October 20, 1981, 43

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[1] "Ex. R." refers to the Excerpt of Record in the court of appeals.

agents of the Postal Service and several Las Vegas police officers entered the premises of petitioner to execute the search warrant. At least 300 employees of petitioner and at least two visitors were present. Local police officers helped secure the entrances and exits to the building. The postal inspectors required all persons to remain seated at their desks or in their respective work areas. They did not permit anyone to leave the premises or to go to the restroom without an escort (*id.* at 8).

The inspectors required each person on the premises to fill out an identification form and to be photographed before leaving. They required those who did not have proper identification to remain in a holding area until their identity could be checked with the Nevada Department of Motor Vehicles. One employee, Donna Hara, was told that failure to fill out the identification form could result in further detention or arrest. Some employees asked to telephone their attorneys, but the inspectors did not permit them to do so until the search was concluded. Another employee without proper identification, Margaret Campbell, was taken to the restroom by a female agent who searched her slip and brassiere. Pet. Supp. App. 8-9.

During the search the postal inspectors seized business items, such as tape recorders, tapes, merchandise, stationery, business forms, files, and envelopes, as well as some personal items, including family pictures, foreign coins, cash, personal papers, and Christmas toys for an employee Christmas party. Some quantities of documents were seized after only spot checks as to their relevance. Materials were hauled away by vans. Also during the course of the search the inspectors broke down the door to the records room following several unsuccessful attempts to locate the key. The inspectors also damaged petitioner's Lektriever, an automatic filing machine. Pet. Supp. App. 9-10.

The district court granted petitioner's Rule 41(e) motion and ordered the government to return all the seized property. The court concluded that there was probable cause to believe that petitioner was engaged in a scheme to obtain money through the mail by fraud, but held that the search warrant authorizing the search of the premises failed to satisfy the Fourth Amendment requirement of particularity with respect to the items to be seized and the persons to be searched (Pet. App. A11). In addition, the court concluded that the inspectors' execution of the warrant "constituted a roughshod running by the Government over the Constitutional rights of [petitioner] and its employees and others" (*id.* at A12).

3. The court of appeals reversed (Pet. Supp. App. 1-22). The court held that "[w]hile the seizure was extraordinarily broad, and in that sense 'general,' under the particular facts of this case the scope of the warrant was justified" (*id.* at 12-13). The court explained that "[i]t was not possible through more particular description to segregate those business records that would be evidence of fraud from those that would not, for the reason that there was probable cause to believe that fraud permeated the entire business operation of [petitioner]" (*id.* at 13).[2]

Finally, the court rejected petitioner's claim that the manner in which the warrant was executed invalidated the entire search. The court stated (Pet. Supp. App. 21-22):

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[2]The court noted that the issue of the validity of the warrant provision authorizing the search of "all persons" on the premises was not before it. The court explained, however, that if probable cause to conduct such a search were lacking, it would not convert the warrant into an impermissible general warrant. "The remedy is not a return of all items seized but selective suppression or return of the items improperly seized" (Pet. Supp. App. 18).

> The breadth of the warrant (which we have held to be justified) rendered the execution of the warrant a most difficult task at best. Some control over the 300 * * * employees was necessary for an orderly search. If some seized items were not business-connected, if some property damage resulted, if some persons suffered unnecessary humiliation, a remedy in each instance is available, specifically designed to meet the specific offense. Considering the magnitude of the task, we cannot, from what we find in the Record, regard the search and seizure as so unduly oppressive or executed with such undue disregard of personal amenity as to shock the judicial conscience and render the search invalid in its entirety.[3]

ARGUMENT

1. Petitioner contends (Pet. 10-19) that the search warrant for its place of business was unconstitutionally overbroad insofar as it authorized the seizure of all business-related documents. Petitioner does not dispute the general principle that "where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized * * *." *United States* v. *Brien*, 617 F.2d 299, 309 (1st Cir.), cert. denied, 446 U.S. 919 (1980). See also 2 W. LaFave, *Search and Seizure* § 4.6 n.62 (Supp. 1983) (generalized description of all documents of corporate defendant permissible "if there is probable cause that virtually all the records of the business are evidence or instrumentalities").[4] Rather, it is petitioner's

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[3]An indictment has not yet been returned in this case. It is expected that the matter will be presented to a grand jury before the end of March.

[4]Cf. *Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976) (far-reaching warrant not impermissibly general where fraudulent scheme "could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little").

argument that the breadth of the authorization to seize documents was unsupported by the probable cause showing underlying the warrant. This fact-bound contention does not warrant this Court's review. In any event, it is without merit.

Postal Inspector Gray's affidavit in support of the search warrant, in addition to describing in detail 10 separate incidents in which petitioner defrauded its clients (Ex. R. 18-26), established through information obtained by an undercover investigator who obtained employment with petitioner that it was the *general practice* of several of petitioner's salesmen, with the knowledge of their supervisors, to misrepresent the company's merchandise and gifts to prospective customers (*id.* at 9-16; Pet. Supp. App. 4-5). Gray's affidavit strongly supported the inference that it was "more likely than not that [petitioner] was using similar, if not identical, fraudulent, deceptive and misleading sales techniques and business practices with most of its customers" and that the incidents related in the affidavit were "only the tip of the iceberg." See *United States* v. *Brien*, 617 F.2d at 308. Petitioner apparently argues (see Pet. 16-17) that the search authorization should have been limited to evidence relating to the particular fraudulent transactions enumerated in the affidavit and to the customers, salesmen, and merchandise involved in those transactions. But the affidavit established probable cause to believe that petitioner's fraudulent conduct was pervasive and ongoing, and therefore there was no reason for the warrant to be circumscribed in the manner suggested.[5]

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[5]The cases upon which petitioner relies (Pet. 18) are inapposite. For example, in *United States* v. *Abrams*, 615 F.2d 541 (1st Cir. 1980), the court struck down a search warrant that authorized the seizure of extensive records from the office of a doctor suspected of Medicare fraud because the warrant was not restricted to records of Medicare or Medicaid patients. Similarly, in *In re Lafayette Academy, Inc.*, 610

2. Petitioner also contends (Pet. 19-22) that it is entitled to return of *all* of the seized property because of the allegedly unconstitutional manner in which the postal inspectors executed the warrant. It appears that petitioner objects to the following actions: briefly detaining individuals on the premises for identification purposes; requiring individuals to remain in specified areas and not to go to the restroom unescorted; refusing to allow the individuals to contact attorneys while the search was in progress; searching the person of one employee; seizing certain items allegedly outside the scope of the warrant; breaking into the records room; damaging petitioner's Lektriever; and allegedly displaying weapons.

a. First and foremost, petitioner makes no attempt to connect any of these actions (except the seizure of items outside the scope of the warrant) with the evidence sought to be returned. Rather, it appears to be petitioner's theory that the manner of execution of the warrant was so offensive as to render all the property taken "illegally seized" within the meaning of Rule 41(e). Petitioner cites no authority for this novel proposition. To the contrary, it is well established that evidence seized pursuant to a warrant search is not rendered "unlawfully seized" simply because another aspect of the search is unlawful. See, *e.g.*, *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); see also *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). And,

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F.2d 1 (1st Cir. 1979), the court ruled that the warrant was defective because Lafayette was suspected of irregularities only in the administration of federally insured student loans, yet the warrant was not limited to records of such loans. Thus, in both cases, unlike here, the evidence of fraud was readily segregable from other property. Indeed, the First Circuit has explicitly recognized that where probable cause exists to suspect a pervasive scheme to defraud, all of the business records of the enterprise may be seized. See *United States* v. *Hershenow*, 680 F.2d 847, 851-853 (1982); *United States* v. *Brien*, 617 F.2d at 309.

of course, a court has no roving commission to depart from established rules of Fourth Amendment jurisprudence in order to punish a perceived violation. See generally *United States* v. *Payner*, 447 U.S. 727 (1980).

As the court of appeals explained (Pet. Supp. App. 21-22), even if there were some basis for the specific allegations made by petitioner, they provide no basis for return of the property properly seized pursuant to a valid warrant. If individuals were illegally searched or detained (an allegation that petitioner has no standing to raise), they have remedies, including the suppression of fruits of those illegalities; similarly, if property was unlawfully destroyed, there is a specific remedy appropriate to the violation. But the allegation that a constitutional violation has occurred provides no basis for invalidating the lawful seizure of evidence untainted by the violation. See *United States* v. *Crews*, 445 U.S. 463, 471 (1980); *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

b. In any event, there is no merit to petitioner's allegations that the execution of the search warrant constituted "outrageous government conduct" (Pet. ii). The detention of individuals on the premises, which clearly did not affect petitioner's rights at all nor contribute to the seizure of the property in question, was a justifiable incident of the execution of the warrant. First, the warrant authorized the search of everyone found on the premises (cf. *Ybarra* v. *Illinois*, 444 U.S. 85, 90 n.2 (1979)), and this necessarily contemplated the brief detention necessary to conduct the searches and identify the persons. Moreover, apart from actually searching the individuals, the limited detention was necessary to facilitate an orderly search of the premises by having individuals available to provide keys or to advise the inspectors of the location of seizable property. A warrant to search premises "implicitly carries with it the limited

authority to detain the occupants of the premises while a proper search is conducted." *Michigan* v. *Summers*, 452 U.S. 692, 705 (1981) (footnote omitted).

By the same token, requiring people to remain at their work stations and escorting them to the restrooms was plainly appropriate to prevent disruption of the search and the disposal of evidence. And refusing to allow them to contact their attorneys casts no cloud on the validity of the search. No individual was placed under arrest during the search, and hence there plainly was no violation of anyone's constitutional right to counsel. See *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); *United States* v. *Timpani*, 665 F.2d 1, 3 (1st Cir. 1981). And, because the search was not conducted pursuant to consent, there is no way in which the failure of individuals to consult with counsel can be said to have led to the discovery of evidence, or, indeed, to have affected the rights of petitioner at all.

To the extent that some items were seized that were beyond the scope of the warrant, those items are subject to return; indeed, the government has returned those personal items that were inadvertently seized. As the court of appeals found, those seizures plainly do not evidence such outrageous government misconduct that the entire search should be declared illegal. Similarly, the fact that the inspectors were armed does not render the search illegal. They certainly had the right to take this precaution, and nothing in the record suggests that they even drew their weapons at any time.

Nor does the record support petitioner's allegations of unreasonable property damage. While it is true that the postal inspectors broke down the door to petitioner's records room, that action was not taken until the inspectors had given petitioner's employees an opportunity to produce the key to the room, and they had failed to do so (Tr.

115-116).[6] With respect to the Lektriever, the evidence showed that the damage occurred accidentally when the machine became unbalanced as the inspectors were emptying it (Tr. 116-117). Indeed, the inspectors attempted to repair the machine (Tr. 27-28).

In sum, the court of appeals correctly concluded (Pet. Supp. App. 21-22) that the search and seizure was not "so unduly oppressive or executed with such undue disregard of personal amenity" as to render the search illegal in its entirety.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1984

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[6]It is true that the door had initially been locked at the inspectors' request when they first entered the premises. At that point, however, the inspectors were not yet prepared to search the room, and presumably they ordered it locked to prevent the removal of records.

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